IN THE HIGH COURT OF SOUTH AFRICA

(NORTH GAUTENG HIGH COURT, PRETORIA)

10/07/2012

Case No:35672/12

In the matter between:

THE FEDERATION FOR SUSTAINABLE ENVIRONMENT	1ST APPLICANT
THE SILOBELA CONCERNED COMMUNITY	2ND APPLICANT

And

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO.
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO.
(3) REVISED.
2012-07-10
DATE SIGNATURE

THE MINISTER OF WATER AFFAIRS	1ST RESPONDENT
THE DIRECTOR GENERAL: WATER AFFAIRS	2ND RESPONDENT
ACTING CHIEF DIRECTOR GENERAL OF WATER AFFAIRS MPUMALANGA	3RD RESPONDENT

DIRECTOR OF WATER AFFAIRS: MPUMALANGA WATER SECTOR REGULATION AND USE	4TH RESPONDENT
MEC CO-OPERATIVE GORVANCE AND TRADITIONAL AFFAIRS, MPUMALANGA	5TH RESPONDENT
ACTING EXECUTIVE MAYOR: THE GERT SIBANDA DISTRICT MUNICIPALITY	6TH RESPONDENT
MUNICIPAL MANAGER: THE GERT SIBANDA DISTRICT MUNICIPALITY	7TH RESPONDENT
THE MAYOR: THE ALBERT LUTHULI LOCAL MUNICIPALITY	8TH RESPONDENT
MUNICIPAL MANAGER: THE ALBERT LUTHULI LOCAL MUNICIPALITY	9TH RESPONDENT
KOMATI CATCHMENT AGENCY	10TH RESPONDENT

JUDGMENT

MAVUNDLA, J.

[1] The applicants approached this Court by way of urgency in terms of Rule 6(12) of the Uniform Court Rules of the High Court of South Africa, seeking an order as follows:

"1. Enrolling the application as an urgent application condoning the Applicants' non- compliance with the forms and service provided for in the rules of court, to the extent necessary;

2. Declaring that the failure of the First to Seventh Respondents to provide access to effective/ reliable potable water for more than seven full days, as prescribed by regulations 3(b) of the regulations relating to compulsory national standards and measures to conserve water (GN 509 in GG 22355 (8 June 2001)) to the residents of Silobela, Caropark and Carolina Town in Carolina, Mpumalanga, is unlawful;

3. Directing the First to Seventh Respondents to provide temporary potable water in line with regulations 3(b) of the regulations relating to compulsory national standards and measures to conserve water (GN 509 in GG 22355 (8

June 2001)) to the residents of Silobela, Caropark and Carolina Town in Carolina, Mpumalanga within 24 hours of the order of this court,

4 Directing the First to Seventh Respondents to engage actively and meaningfully with the First and Second Applicants regarding.

4.1 the steps being taken to ensure that potable water can once again be supplied through the water supply services in Silobela, Caropark and Carolina Town in Carolina, Mpumalanga; and

4.2 where, when, what volume, and how regularly temporary water will be made available in the interim;

5. Directing the First to Seventh Respondents to report to this court within one month of this court order as to the measures that have been taken to ensure that portable water is supplied through the water services in Silobela, Caropark and Carolina Town in Carolina, Mpumalanga;

6. Permitting any party subsequently to re-enroll the application for hearing on the same papers, duly supplemented, on reasonable notice to the other parties;

7. Ordering the costs occasioned by this application to be paid by whomsoever of the Respondents who oppose this application, jointly and severally, the one paying the order to be absolved;

8. Further and / or alternative relief."

[2] The first applicant (the FSE) is a duly registered Non-Profit Organization incorporated in terms of the Non-Profit Organization Act 71 of 1977, and brings this application in terms of s38 (c), (d) and (e) of the Constitution of the Republic of South Africa, Act 108 of 1996..

[3] The second applicant is the Silobela Concerned Community, a voluntary association consisting of 150 members, all of whom are residents of Silobela which is a residential area predominated by Africans situated in the outskirts of Carolina in Mpumalanga.

[4] It is common cause that the water supply in Silobela and Carolina is contaminated by "acid mine water" to an extent that it is not healthy for both human and animal consumption. It is also common cause that, in an endeavor to alleviate the plight of the community in the affected locality around February 2012, water tanks were brought to supply water to Carolina and Silobela from the neighbouring towns of Breyten and Chrissiesmeer. About 20 water tanks were placed around Carolina and its surroundings, including Silobela.

[5] According to the applicant, seven tanks were placed around Silobela. The applicants further averred that from early March 2012, until beginning of May 2012, the system of providing potable water through the tanks proved inadequate. Sometimes some of the tanks were not refilled, some remained empty. The tanks were accessed on "first come first served" basis. The end result was that the water supply in general was inadequate. Some of the residents have to walk long distances to access the potable water from the tanks.

[6] The case of the applicants is that the residents of Carolina have not had an effective or reliable supply of fresh drinking water for an extended period beyond the seven day period prescribed for this year, in terms of the regulations relating to compulsory national standards measures to conserve water (GN509 in GG 22355(8June 2001)) (the Regulations"). Their case is that every day that the residents of Carolina do not have access to an effective and reliable supply of potable water constitutes a gross infringement of the constitutional right to have access to water

[7] The applicants further contend that the respondents need to put measures in place in the medium and long term that will address providing potable water to the residents as well as the mitigation and prevention of water pollution by the mines in the area, which measures should be made in consultation with the residents and other interested and affected parties.

[8] The applicants contend that the water supply situation is now dire and as the result this matter is urgent.

[9] I must hasten to remark that Silobela, like many other such areas, invariably still bears the brunt of the legacy of apartheid, under developed, under resourced. In the matter of *Democratic Alliance and Another v Masondo NO and Another*[1], O'Regan J, with respect aptly put it as follows:

[1] 2003 (2) SA 413

"[57] The legacy of apartheid era therefore is that our towns are deeply divided Eight years[2] after the dawn of the democratic era, this remains so. There is much to be done to achieve the constitutional vision of a society in which the divisions of *the past*'[3] have to be healed. The *unjust and unequal allocation of resources over* decades, indeed centuries, means that those who live in formerly white suburbs generally have better services and conditions of life than those who live in the townships formerly reserved for black people, and still, as a matter of fact, largely occupied by black people . These disparities were graphically captured by Kriegler J in his judgment in Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council [4]as follows:

'The apartheid city, although fragmented along racial lines, integrated an urban economic logic that systematically favoured white urban area at the costs of black urban and per-urban area. The results are tragic and absurd: sprawling black townships with hardly a tree in sight, flanked by a vanguard of informal settlements and guarded by towering floodlights, out of stone throws reach. Even if only short distance away, nestled amid trees and water and birds and tarred roads and paved sidewalks and streetlit suburbs and parks, and running water, and convenient electrical amenities... we find white suburbia.'"

The present application must, in my view, be seen in the backdrop of the said realities eloquently captured herein above.

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[2] Now eighteen years (my comment) .
[3] Preamble the to the Constitution.
[4] 1999 (1) SA 374 (CC) at 417 B-C.

[10] It is common cause that the first and second respondents are responsible for the implementation and administration of the "the Water Services Act") and its regulations and the National Water Act 36 of 1998 ("National Water Act") and its regulations.

[11] It is also not disputed that the Third to Tenth Respondents are responsible for providing water resources in and around Carolina, Mpumalanga in accordance with the provisions of the Water Services Act.

[12] It is common cause that the first to the ninth respondents, in various tiers and spheres, are part of the National Government which is enjoined Constitutionally to provide to communities, basic services. which entail, *inter alia*, basic water services *vide s2, sub-ss (1) et (2) of s3* Water Services Act of 108 of 1997 and National Water Act No. 36 of 1998.

[13] The first to fourth respondents are part of the National government and provincial government enjoined to, *inter alia*, provide "support and strengthen the capacity of the municipalities to manage their own affairs and, to exercise their powers and perform their functions"[5] without compromising or impeding a municipality's ability or right to exercise or perform its functions[6].

[14] The sixth to ninth respondents are also enjoined, as local government to, *inter alia*,:

"(a) to provide democratic and accountable government for local communities;

(b) to ensure the provision of services to communities in a sustainable manner;

(c) to promote social and economic development;

(d) to promote a safe and healthy environment;

(e) to encourage the involvement of communities and community organizations in the matters of local government ." within its financial services.[7] This entails, *inter alia*, that within its resources, a municipality should strive

[5] S154 of the Constitution of the Republic of South Africa, Act 108 of 1996.
[6] S151(4) of the Constitution of the Republic of South Africa, Act 108 of 1996.
[7] S152(1)(d) of the Constitution of the Republic of South Africa, Act 108 of 1996.

towards improving the quality of life of its community.[8] Municipalities are also duty bound to be responsive to the needs of their communities.[9]

[15] I further take note of the fact the Constitution[10] provides, *inter alia*, as follows:

" s27 **Health care, food, water and social security**---

(1) Everyone has a right to have access to---

(a) ...

(b) Sufficient food and water

(c) ...

(2) The State must take reasonable steps legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.".

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[8] Vide definition of 'development" Local Government: Municipal Systems Act. 32 of 2000.
[9] Vide s6(2)(a) of Local Government: Municipal Systems Act. 32 of 2000.
[10] The Constitution of the Republic of South Africa. Act 108 of 1996.

[16] Whereas the applicants contend that the matter is urgent, thus their approaching this Court on such basis, the protestation of the fifth to ninth respondents is to the contrary. They contend that the water problem manifested itself as early as February 2012, if not even earlier. They contended that they responded promptly by providing the water tanks, some of which were burnt by some of the community members. They further contend that the matter is not urgent.

[17] In my view, the State is enjoined to take measures [11] that are progressively geared towards eradicating the incongruity in living areas of communities, structured on racial divide by the hitherto apartheid regime. If the legacy of apartheid is ever to be eliminated, it requires that the Courts, must also strive to encourage the national government and all its structures, to boldly and with haste march towards the cherished objective encapsulated in the preamble. In this regard, in my view, what was said by Yacoob J in the matter of

[11] S26(2) of the Constitution, Act 108 of 1986

Government of the RSA and Others v Grootboom and Others[12] also applies in respect of s27 entrenched rights as well:

> "E Obligations imposed upon the State by s26
>
> Approach to interpretation
>
> [21]Like all other rights in chapter 2 of the Constitution (which contains the Bill of Rights) s26 must be construed in its context. The section was carefully crafted. *It contains three subsections. The first confers a general right of* access to adequate housing. The second establishes and delimits the scope of the positive obligation imposed upon the State to promote access to adequate housing and has three key elements. The State is obliged; (a) to take reasonable legislative and other measures; (b) within its available resources; (c) to achieve the progressive realization of this right."

[18] This case relates to Constitutionally entrenched fundamental right to access to water. I am of the view that, when fundamentally entrenched rights are violated or compromised or restoration to normality the enjoinment of those rights, the matter intrinsically becomes urgent. I therefore do not agree with the submission made on behalf of the fifth

[12] 2001 (1) SA 46 (CC) at 61F-G et p69-70B.

to sixth respondents that the matter is not urgent. I therefore find that the matter is urgent.

[19] The first to the fourth respondents are not as such opposing the application, save the costs order against them. They contend that, in as much as they nationally must provide water, however at local level it is the function of the local government to provide this service. They are committed to provide the necessary financial assistance to the Municipality, as they did previously when they were alerted to the water problem when it started. They are debarred from interfering and imposing their will on the local government. There was therefore no need to join them in these proceedings, nor is there any need for them to be involved in the discussions and reporting back to court as envisaged in orders 4 and 5 above.

[20] In my view, to expect of the national government to interfere with administrative issues that resort in the sphere of local government, would negate the very separation of spheres created by the constitution. I am I am persuaded by these submissions made on

behalf of the first to fourth respondents . I am equally persuaded that there is no need to mulct these respondents wit costs. I am also of the view that there is no need to order the applicants to pay these respondent's costs.

[21] It is not disputed by the ninth respondents that water in the relevant area, in cause, is polluted. These respondents contend that they have made big strides in solving the water pollution problem. They anticipated that around 13 June 2012 water would have been declared safe for human consumption, which in not as yet the case. They further contend that there is no water shortage in Carolina and Caropark and that the problem was only in Silobela. They further contend that the local municipality has done the best it could to address the water problem by utilizing the Rapid Response Unit and engaging a Process Engineer to look at the water works and certain changes were made to the treatment or process according to the recommendations by the Process Engineer. In this regard they have expended a sum of R410 000. 00 for engaging a service provider for water tanks and an amount of R2.4million for the accelerated Infrastructure Committee Program. They further contend that the

Department has made immense progress towards improving the water problem. They further contend that the cause of the water problem is not on their part but the mines. They have however not stated what steps they have taken against the mines towards coming with a permanent solution to this problem.

[22] It is common cause that some of the residents in Silobela burnt some of the water tanks. The failure to resolve the water problem within seven days, cannot be squarely placed in the door steps of the respondents so as to warrant order 2 prayed for herein above. It would be different were it that the residents themselves were in no way to blame to such a delay. I am therefore disinclined to grant prayer 2.

[23] The applicants have complained about the quantity of the water provided. They have contended that in some instances the tanks were not refilled and other instances were empty. The applicant contended that 25 liters per day per household is not sufficient. The sixth to the ninth respondents refuted this, however, in my view, without placing necessary data upon which this refutation is made.

[24] The sixth to ninth respondents are enjoined by the Local Government Act to strive to achieve and develop the objectives referred to in s152 of the Constitution[13]. They are equally enjoined to have a strategic plan to achieve these aforesaid objectives. In my view, within these obligations, the municipality must strive to resolve as speedily as possible the water problem in Silobela and Carolina. It must equally have a progressive plan to achieve this objective and must engage and inform the community of the steps and progress of doing so. It is in this context that I understand the reason for the applicants to seek prayers 3 to 6. These respondents are accountable to the communities. In my view, the orders sought re reasonable and should therefore be granted, notwithstanding their fierce objective to these reliefs being granted.

[25] I take note of the fact that the fifth respondent did not oppose the application. In the result there is no reason to grant a costs order against this respondent.

[13] S23 of Act 32 of 2000.

[26] In the premises I make the following order:

1. That the application was urgent and the Applicants' non-compliance with the forms and service provided in terms of the Rules of Court, to the extent necessary is condoned;

2. That the Sixth and Seventh Respondents are ordered to provide temporary potable water in line with regulations 3(b) of the regulations relating to compulsory national standards and measures to conserve water (GN 509 in GG 22355 (8 June 2001)) to the residents of Silobela, Caropark and Carolina Town in Carolina, Mpumalanga within 72 hours of the order of this court;

3 That the Sixth and Seventh Respondents are directed to engage actively and meaningfully with the First and Second Applicants regarding:

3.1 the steps being taken to ensure that potable water can once again be supplied through the water supply services in

Silobela, Caropark and Carolina Town in Carolina, Mpumalanga; and

3.2 where, when, what volume, and how regularly temporary water will be made available in the interim;

4. That the Sixth and Seventh Respondents are ordered to report to this court within one month of this court order as to the measures that have been taken to ensure that portable water is supplied through the water services in Silobela, Caropark and Carolina Town in Carolina, Mpumalanga;

5. That any party is permitted to subsequently re-enroll the application for hearing on the same papers, duly supplemented, on reasonable notice to the other parties;

6. That the sixth to ninth Respondents are jointly and severally, the one paying the other to be absolved; to pay the costs

occasioned by this application, on party and party scale, which costs shall include the costs of 2 (two) counsels.

7 That no order is made against the other respondents not mentioned in the orders herein above.

N .M. MAVUNDLA

JUDGE OF THE COURT

HEARD ON THE	: 03 / JULY / 2012
DATE OF JUDGEMENT	: 10 / JULY / 2012
1ST APPLICANT'S ATT	: LAWYERS FOR HUMAN RIGHTS
2ND APPLICANT'S ATT	: LEGAL RESOURCES CENTRE
1ST 2ND APPLICANT'S ADV	: ADV J.R. BRICKILL et ADV G. SNYMAN
1ST-4TH RESPONDENTS' ATT	: TWALA ATTORNEYS
1ST-4TH RESPONDENT'S ADV	: ADV N. DUKADA SC
6TH –9TH RESPONDET'S ATT	: GUMEDE ATTORNEYS

6TH –9TH RESPONDET'S ADV : ADV L.P. MKHIZE